

THE CASE OF PASQUALE CARDENUTO:

A Study In The Importance Of Retaining
An Expert In Conjunction With
Arson Litigation

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In 1983, Pasquale Cardenuto's Italian restaurant in Westfield, Massachusetts, was destroyed by a fire. Cardenuto quickly found himself the target of a state police arson investigation. Now, nearly seven years later, he is still waiting to learn whether he will have to go to prison. Cardenuto was convicted of arson and burning his restaurant with intent to defraud an insurer on March 19, 1985. The conviction was overturned in September 1988, due to part to the arson investigation work of Dr. Alexander Patton, who assisted Cardenuto's defense. The Commonwealth appealed, and the case is now pending before the Supreme Judicial Court of Massachusetts.

It was clear from the start that the fire which destroyed the restaurant had been set and that gasoline had been used as an accelerant. At trial the Commonwealth did not present any evidence that Cardenuto was present at the scene of the fire, or that he set the fire himself. Nor was there any specific evidence linking Cardenuto to the fire. The Commonwealth's theory of the case was that Cardenuto had left the rear door of the restaurant open for an employee to return to set the fire. The employee was jointly tried with Cardenuto and acquitted.

At trial, the Commonwealth's circumstantial case against Cardenuto consisted of the following: the only keys to the restaurant that Cardenuto was aware of were possessed by his parents and himself; on the night of the fire, Cardenuto was the last person to leave the restaurant, at approximately 11:20 p.m.; the rear door of the restaurant, which is where the fire was started, was found unlocked when firemen arrived at the scene shortly after midnight; and although the restaurant was making a small profit, Cardenuto was insured for approximately \$300,000, twice as much as his purchase price several years earlier. In essence, the Commonwealth argued that no one had any reason to set the fire aside from Cardenuto, who stood to profit from the insurance proceeds. The argument prevailed despite uncontested evidence that Cardenuto was not overinsured.

On the night of Cardenuto's conviction, his brother-in-law, Nicola Robustelli, went to the office of Cardenuto's trial counsel and confessed that he, unknown to Cardenuto, had set the fire. Robustelli, who had no criminal record, signed a written confession. Six days later, Cardenuto's trial counsel appeared before the court for Cardenuto's sentencing, and for the first time informed the court, the district attorney's office, and his own client of the confession he had received from Robustelli. The court agreed to postpone sentencing while Robustelli's confession was investigated. Cardenuto's trial counsel filed a motion for a new trial based on this newly discovered evidence.

It quickly became apparent that the Commonwealth was not going to accept Robustelli's confession and drop its case against Cardenuto. Instead, the Commonwealth challenged Robustelli's story as to how and why he set the fire and opposed the new trial motion arguing that the confession was a recent contrivance cooked up between Robustelli and Cardenuto in order to obtain insurance proceeds. Consequently, Cardenuto's trial counsel knew that his most important task was to present evidence at a new trial hearing that would corroborate Robustelli's confession. Nevertheless, Cardenuto's trial counsel failed to retain an arson expert to evaluate Robustelli's story. He also failed to conduct a fact investigation which would have uncovered numerous witnesses who might have testified to Robustelli's motive and opportunity.

On June 14, 1985, Cardenuto was sentenced to MCI - Cedar Junction for six to ten years. Execution of sentence was stayed pending a hearing and ruling on Cardenuto's motion for a new trial. At an evidentiary hearing on the motion held later that month, the court rejected Robustelli's confession, denied the motion for a new trial, and stayed execution of sentence until further order. The Commonwealth charged Robustelli with perjury. The Appeals Court of Massachusetts affirmed the denial of the motion for a new trial, and further appellate review was denied by the Supreme Judicial Court.

Cardenuto first came to my office in 1987. An investigation to corroborate Robustelli's confession was quickly begun. The evidence uncovered was staggering and overwhelmingly supported Cardenuto's claim of innocence. What was even more extraordinary was that none of this evidence had been offered by Cardenuto's counsel at the hearing on the motion for a new trial which was held after Robustelli's confession. At trial, the Commonwealth had argued that Cardenuto and his parents were the only ones with keys to the restaurant, and that Cardenuto must have left the back door open since he was the last to leave the restaurant on the evening of the fire. Investigation revealed that Cardenuto often allowed restaurant employees, including Robustelli, who worked at the restaurant, to borrow his truck to pick up food and goods used at the restaurant. The key to the rear door of the restaurant was on the key chain to the truck. Robustelli himself testified at the new trial hearing that he had made a copy of the key to the rear door, but no evidence was offered explaining how the key had come into Robustelli's possession in the first place. Five former restaurant employees were tracked down by my investigator. Each recalled Cardenuto's frequent practice of allowing employees to use his truck and lending them his key chain. Each recalled that Robustelli often picked up goods and made deliveries with Cardenuto's truck.

Evidence of Robustelli's motive to commit arson was also readily available. Indeed, a series of family disputes had been ignored by Cardenuto's trial counsel. Cardenuto had been furious with Robustelli for gambling away his money, and mistreating his wife, Cardenuto's sister. He encouraged his sister to leave Robustelli. For his part, Robustelli was extremely bitter that Cardenuto had not offered him a piece of the restaurant business.

Furnished with this evidence of motive and opportunity, my office brought a new motion for post conviction relief. Eleven witnesses appeared at a two-day evidentiary hearing in June and July 1988. Former restaurant employees testified concerning Robustelli's access to the back door key. Other employees testified concerning the bad blood between Robustelli and Cardenuto. Cardenuto's sister testified, further detailing the hostility between her husband and her brother. An acquaintance of Robustelli testified that days before the fire he had seen Robustelli at a hardware store purchasing a red gas can; a similar gas can was found at the scene of the fire. A gas station attendant who worked nearby the restaurant testified that days before the fire, Robustelli had come into the gas station and filled up a can with gasoline, something he had never seen him do before.

Dr. Alexander Patton also testified. As a result of his examination of the fire scene, physical evidence from the fire - including photographs of the scene - and his review of both the trial and the new trial motion hearing testimony, Dr. Patton concluded that Robustelli's description of the manner in which he set the fire was credible, and consistent with the flame and heat impact on the rear door, the screen door, the door frame and vinyl floor moldings inside the screen door. Robustelli claimed that he started the fire by placing a trailer of gasoline under and outside the back door, and adding to the trailer pieces of clothing and newspaper, particularly on the inside of the back door, and igniting the trailer from outside the restaurant by tossing a match at the gas trailer. Dr. Patton testified that this description was consistent with his own findings. But more significantly, Dr. Patton testified that Robustelli's confession was consistent with the testimony and findings of the Commonwealth's own arson expert at trial. State Trooper and Fire Investigator Robert Corry had been the catalyst in the prosecution's targeting of Cardenuto. He had been the Commonwealth's key witness at trial, describing how the fire started, and the manner in which it spread. Dr. Patton reviewed the trial testimony of Trooper Corry and compared it to his own analysis of the fire's origin. Dr. Patton concluded that Trooper Corry's trial testimony was correct - the fire was started with a trail of gasoline going out the back

door and ignited from outside the restaurant. On direct examination, Dr. Patton explained in detail how his own findings supported the conclusions offered by Trooper Corry at trial.

Dr. Patton also addressed several issues that had been raised by the trial court in denying the new trial motion. In its Order rejecting Robustelli's confession, the court made the following findings: that since Robustelli said that he had spread gasoline everywhere, the fire should have spread evenly, which it did not; that the court could not understand how the fire could get inside through a closed door; and that Robustelli's testimony that he used gasoline-soaked clothing in setting the trailer was not credible since no residue of clothing was found near the back door.

Without an expert in arson investigation, Cardenuto's trial counsel was unable to address these issues. At the hearing for postconviction relief, Dr. Patton explained that each of these findings was incorrect. First, Dr. Patton testified that Robustelli's description of the manner in which he sprayed and poured gasoline in the restaurant would be consistent with nonuniform burn patterns. Second, Dr. Patton testified that because the back door was not hermetically sealed it would not seal out a flammable mixture of gasoline and air and ignition on the outside of the door frame could spread beneath the door. Third, Dr. Patton noted that if the apparel used by Robustelli in setting the fire was cotton or cotton-polyester blend, its burning would have produced a light ash-like residue easily disturbed by air turbulence from the fire itself, or by the movement of fire fighters, or by water from the fire-fighting operations. Dr. Patton also explained the absence of substantial burning on the bottom of the back door was not necessarily inconsistent with Robustelli's story that he had passed the trailer of clothing and gasoline beneath the closed, but unlocked, back door. Dr. Patton explained that the air forces of the fire itself could have easily pushed the back door open, sparing the bottom of the back door from severe burn.

The significance of Dr. Patton's direct testimony was to show how Cardenuto's defense suffered by his trial counsel's failure to retain an arson expert. But the most dramatic demonstration of this did not occur until cross-examination. The assistant district attorney set out to confirm that Dr. Patton agreed with the trial testimony of the Commonwealth's expert, Trooper Corry. Dr. Patton was pressed to concede that he agreed with virtually all of the findings of Trooper Corry, and had simply reached a different conclusion as to whether these findings were consistent with Robustelli's confession. This provided the opening we were hoping for, and which Dr. Patton took full advantage of. Dr. Patton pointed out that Trooper Corry's testimony at trial and subsequent testimony at the post conviction new trial hearing were quite different. At the new trial hearing, Trooper Corry testified that Robustelli knew "next to nothing" about how the fire had started and that Robustelli's explanation was entirely inconsistent with the Commonwealth's fire investigation findings. Dr. Patton pointed out that the inconsistencies were not in Robustelli's confession, but in the altered testimony of Trooper Corry between trial and the new trial hearing. For example, Dr. Patton pointed out that at trial Trooper Corry had testified that the fire was started with a trailer which was led out the back door and ignited outside the restaurant. At the new trial hearing, after Robustelli had confessed that this was precisely the way in which he had started the fire, Trooper Corry changed his testimony and stated that the trailer had not gone out the back door and that Robustelli's description of starting the fire outside the restaurant was incredible. Thus, Dr. Patton's cross-examination testimony demonstrated yet another way in which Cardenuto's defense had been hampered by the failure to consult an arson expert, who might have testified concerning the inconsistencies in Trooper Corry's testimony. The significance of Dr. Patton's testimony was underscored when Trooper Corry subsequently testified at the hearing that he had either misspoke at trial in describing how the fire had started, or that his testimony had been improperly recorded by the court stenographer.

On September 1, 1988, the Superior Court granted Cardenuto's motion for post conviction relief and issued its findings. The court found that the defendant's trial counsel's failure to appeal the denial of Cardenuto's motion for a required finding of not guilty amounted to conduct which fell "below that of the ordinary fallible lawyer, and which indeed did result in substantial prejudice to the defendant." In addition, the court concluded that defendant's trial counsel provided ineffective assistance at the hearing on the motion for a new trial. In particular, the court criticized counsel's failure to pursue evidence of Robustelli's access to the

restaurant keys and failure to present evidence of Robustelli's motive for setting the fire. Lastly, the court found that trial counsel's failure to seek advice from an arson expert to evaluate Robustelli's confession constituted ineffective assistance.

The Commonwealth appealed the Superior Court's order granting post-conviction relief. On May 4, 1989, this appeal was taken up *sua sponte* by the Supreme Judicial Court. The case was argued before the Court on October 1, 1989. With the options of a jail sentence, a new trial, or an acquittal, Cardenuto is waiting for the Court's decision.

[The Supreme Judicial Court's decision was issued on January 16, 1990. The Court upheld the trial court's decision, and further found that there was insufficient evidence to support conviction. The S.J.C. instructed the trial court to enter a judgment of acquittal. Commonwealth v. Cardenuto, 406 Mass. 405, 548 N.E.2d 864 (1990).]